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EXECUTORY ULTRA VIRES TRANSACTIONS.

CERTAIN associates were incorporated, pursuant to the provisions of a general law, under the name of the X Transportation Company. A condition precedent to incorporation was that a certificate of incorporation should be filed in a certain public office, and that this certificate should contain a statement of "the purpose for which the corporation is formed." The certificate so filed stated that the purpose was "to engage in the business of transporting persons by means of hacks or other vehicles."

Thereafter the incorporated associates voted also to engage in the business of transporting goods by express. In the name of X, and by the use of the funds of X, they purchased the necessary equipment, employed the necessary servants, and, by advertisements and otherwise, stated to the public that X was engaged in the express business. For some years they carried on an extensive express business in the name of X, and the net profits were distributed to the associates as shareholders of X.

M delivered goods to be carried by express to one of the servants so employed, and the servant gave to M a receipt which stated that X undertook to deliver the goods. The charges, amounting to \$1.00, were prepaid. The goods were not delivered. M now sues X to recover \$100, and the facts are such that, if X had been authorized to engage in the express business, M could recover such sum from X.

X defends on the ground that making the contract in question was beyond its powers, and that therefore it can be held to no liability for the breach of such contract. Ought this defense to prevail?

Conceivably a corporation could be formed, if there were the necessary legislative sanction, with authority to do all acts which a human being might lawfully do. But American legislatures in granting the corporate privilege, either by special charter or pursuant to the provisions of a general law, always have been, and still are, accustomed to incorporate any given body of associates

for some, and not for all, purposes. The authorized scope of corporate action by the associates is defined.

When the associates assume to act in the name of the corporation outside the authorized scope of their corporate action, some judges have felt that they *could* not hold the corporation liable for such acts. They reason that a corporation *can*, in the nature of things, act only within the limits set by the state; and they conclude that the only question which, in the nature of things, they can consider is whether the natural persons who assumed to do the act in the name of the corporation are to be held liable.

To this reasoning there are two answers.

(1) Conceding that a corporation is invisible and intangible, and that it has its being only in the imagination of the law, the law nevertheless recognizes that the corporation is responsible for some visible, tangible acts. Otherwise, corporation law would be mere legal ghost-lore. Human beings act, and responsibility for some of their acts is certainly cast upon the corporation. Responsibility for any act of a human being *may* conceivably be cast upon the corporation. *Respondeat Corporation.* A legal unit may be held responsible for the act of another unit, even though the legal unit did not have the power to do the act in question. A man without arms may be responsible for the note which his agent has signed.

(2) Unauthorized corporate action is no more a fiction than is authorized corporate action. If the associates assume to act in the name of the corporation beyond the authorized scope of their corporate action, there is unauthorized corporate action. The charter, or other legislative sanction, does not make possible what is otherwise, in the nature of things, impossible; it makes authorized what is otherwise unauthorized. It is for the state to grant the authority to associates to act as a corporation,—as a one. If the state itself does not object to certain unauthorized corporate action, the courts should consider whether they will allow a private individual to show collaterally the lack of authority.¹ All courts have given a wide scope to the doctrine that collateral attack upon unauthorized corporate action may be denied, under some circumstances.²

¹ For a fuller statement of this reasoning, see 23 HARV. L. REV. 495.

² See the authorities cited in the notes to the articles in 20 HARV. L. REV. 456; 21 HARV. L. REV. 305; 23 HARV. L. REV. 495.

We turn, then, to the consideration of the question, not whether the defense of *ultra vires* must be allowed, owing to the nature of things, but whether such defense ought to be allowed.

Incorporated associates engage in a business in which they are not authorized to engage; they procure an outsider, M, to contract with them as a corporation with respect to such business; then, when M sues them as a corporation, they defend on the ground that they were not authorized to make the contract as a corporation. They seek to take advantage of their own wrong.

The case put at the opening is sharply to be distinguished from a case where all of the incorporated associates have not consented that the funds of the corporation should be employed in a venture outside the scope of corporate action, as defined in the certificate of incorporation. Under modern conditions, the authorized scope of action by any particular corporation is limited, partly because the state for reasons of public policy wishes to confine the corporate action within defined limits, but chiefly because it is for the advantage and protection of the associates that they should know for what purposes the funds of the corporation are to be used. If an associate contributes funds to be used in one venture, he has the right to insist that they shall be used in no other. If the officers or directors propose to use the funds or credit of the corporation in some other venture, it is entirely clear that any one of the incorporated associates may restrain them,—and that, even though an overwhelming majority of the associates approve the proposed action. If the officers or directors have assumed, in the name of the corporation, but without the consent of all the incorporated associates, to make with M a contract which is outside the scope of corporate action, as defined in the certificate of incorporation, he ought not to be entitled to hold the corporation for a breach of the contract any more than any outsider is entitled to hold a principal for the breach of a contract which an agent has assumed to make in the name of the principal, if the making of such contract was beyond the scope of the agent's authority.³

³ A principal must respond for the contract of his agent made without authority but with apparent authority; similarly if a corporation has authority to do a certain act under some circumstances, and it appoints an agent with authority to do such act under such circumstances, and the agent does the act under other circumstances, responsibility for the act will be cast upon the corporation in favor of an outsider who did not know that the act was unauthorized. *Monument Nat'l Bank v. Globe*

If, however, all the incorporated associates have consented that the funds of the corporation should be employed in a venture outside the scope of corporate action, as defined in the certificate of incorporation, and a contract has been made in the course of such venture in the name of the corporation, the corporation cannot be allowed to escape liability on such contract, for the sake of affording protection to the incorporated associates.⁴

Two other reasons for allowing the corporation to escape have been advanced.

(1) The first reason advanced is that all unauthorized corporate action is illegal,—an encroachment upon the state's prerogative; that the scope of authorized corporate action by any particular corporation can be determined by examining its certificate of incorporation (which is a matter of public record), together with the general laws and constitution of the state; that persons dealing with corporations are therefore to be charged with knowledge of the scope of authorized corporate action; and that if M makes a contract with the corporation outside of such scope he has voluntarily participated in an illegal transaction. The corporation is permitted to plead *ultra vires*, not because the corporation ought to escape liability, but because no relief ought to be given to M.

Injustice between the parties ought not to be done, unless the

Works, 101 Mass. 57; Credit Co. v. Howe Machine Co., 54 Conn. 357; Bissell v. Michigan Southern Companies, 22 N. Y. 258, 289, 304; National Bank v. Young, 41 N. J. Eq. 531; Stouffer v. Smith-Davis Co., 154 Ala. 301; Jacobs Co. v. Southern Co., 97 Ga. 573; Lucas v. White Line Transfer Co., 70 Ia. 541, 546; Miners' Ditch Co. v. Zellerbach, 37 Cal. 543; Colorado Co. v. American Co., 97 Fed. 843; Norwich v. Norfolk Co., 4 E. & B. 397, 443; David Payne & Co., [1904] 2 Ch. 608.

⁴ The consent of the shareholders need not be expressed by any formal vote of authorization or ratification. Where the funds of the corporation are openly employed in a venture outside the contemplated scope of corporate action, so that the fact could upon inquiry be ascertained, if the shareholder does not restrain the further prosecution of the venture within a reasonable time, it is proper for the law to impose upon him a ratification of such employment. If shareholders are to be protected, to the detriment of outsiders, against the unauthorized acts of the directors and officers, it is not improper to impose a duty upon shareholders to inquire as to the conduct of the directors and officers, and to restrain such conduct, if improper.

This view is supported by Bissell v. Michigan Southern Companies, 22 N. Y. 258, 267, 279; Kent v. Quicksilver Mining Co., 78 N. Y. 159, 184; Camden R. R. Co. v. Mays Landing Co., 48 N. J. L. 530, 571; Bangor v. State Co., 203 Pa. 6; Pannebaker v. Tuscarora R. R. Co., 219 Pa. 60; Western Development Co. v. Caplinger, 86 Ark. 287; Denver Fire Ins. Co. v. McClelland, 9 Colo. 11. Cf. *Re Phoenix Assurance Co.*, 2 J. & H. 441.

interests of the state require it. It is quite conceivable that some unauthorized corporate action might be so objectionable to the state,—that the need of checking it might be so urgent, that the courts ought, for the sake of a general inhibitory policy, to allow the lack of authority to be shown collaterally even by the associates themselves.⁵ But under modern conditions, where the corporate privilege is so freely given for most purposes, the sacrifice of M in order to prevent encroachment upon the state's prerogative ought not to be the rule,—it ought at most to be an exception to the rule to be justified by special circumstances.

Suppose associates who have attempted to incorporate, but fail to perform a condition precedent to incorporation, assume to contract as a corporation with M, and M later sues them as a corporation for breach of the contract. The general rule certainly is that the associates may not defeat this action by showing their lack of authority to act as a corporation.⁶

(2) The second reason advanced is that it is not sufficient to consider only those who were the incorporated associates at the time the contract was made, but that the court must consider two other classes: (a) those who may have purchased shares of stock since the contract was made, and (b) the creditors of the corporation; that when one buys shares of stock in a corporation, or lends money to it, he is entitled to assume that its funds are, and will be, employed only in ventures within the scope of corporate action, as defined in its certificate of incorporation; that M is to be charged with knowledge of the scope of contemplated corporate action; and that if M makes a contract with the corporation outside of such scope he has voluntarily participated in a transaction which he knows may be detrimental to future shareholders and to creditors. For their protection, therefore, the corporation must be allowed to escape liability on the contract.

It is as though M contracted with A, as agent of X; and that X should seek to defend, not on the ground that A was not authorized to make the contract, but on the ground that X owed a

⁵ See *Bissell v. Michigan Southern Companies*, 22 N. Y. 258, 287; *N. Y. State Loan Co. v. Helmer*, 77 N. Y. 64; *Pratt v. Short*, 79 N. Y. 437; *N. Y. Ins. Co. v. Ely*, 5 Conn. 560; *Franklin National Bank v. Whitehead*, 149 Ind. 560; *Re Mutual Ins. Co.*, 107 Ia. 143; *State v. Savings Bank*, 136 Ia. 79.

⁶ See the authorities cited in the notes to the articles in 20 HARV. L. REV. 456; 21 HARV. L. REV. 305.

duty to other persons not to make such a contract, and that M knew he owed such duty.

All persons must at their peril ascertain the laws. The observance of the laws is so essential to public welfare that this rule is justified, in spite of any hardship which it from time to time imposes on particular individuals. Because certificates of incorporation are matters of public record, some courts have leaped to the conclusion that they should lay down a second rule to the effect that all persons must at their peril ascertain their contents. But the considerations of public welfare which justify the first rule are far stronger than any considerations of public welfare tending to support such a second rule. The existence of the first rule does not, without more, justify the existence of the second rule.

In *East Anglian Ry. Co. v. Eastern Counties Co.*⁷ the directors of the defendant entered into a covenant to pay to the plaintiffs the expense of promoting certain bills before Parliament. The expense was incurred, and the defendant was allowed to escape paying, on the ground that such a covenant was *ultra vires*. Jervis, C. J., said⁸ that the act incorporating the defendant

"is a public act, accessible to all, and supposed to be known to all; and the plaintiffs must, therefore, be presumed to have dealt with the defendants with a full knowledge of their respective rights, whatever those rights may be."⁹

In *Bissell v. Michigan Southern R. R. Co.*,¹⁰ the directors of the defendant corporations, with the acquiescence of the shareholders, operated a railroad. The operation of this railroad was not within the contemplated scope of corporate action. A passenger upon such railroad sued the defendants for breach of their contract to carry him safely. Comstock, J., said:¹¹

"A traveller from New York to the Mississippi can hardly be required to furnish himself with the charters of all the railroads on his route, or to study a treatise on the law of corporations."

The question whether a certain contract is within the contemplated scope of corporate action is usually a question which a lay-

⁷ 11 C. B. 775 (1851).

⁸ At p. 811.

⁹ See *Broughton v. Manchester Water-Works*, 3 B. & A. 1 (1819), and *Fairtitle v. Gilbert*, 2 T. R. 169 (1787). Cf. *Doe v. Horne*, 3 G. & D. 239 (1842).

¹⁰ 22 N. Y. 258 (1860).

¹¹ At p. 281.

man is not competent to determine. He needs the advice of counsel. There is a large difference between a contract by which a corporation undertakes to take a lease of a railroad, and a contract by which the corporation undertakes to carry a passenger over the line so leased. The opportunity for investigation and deliberation, and the importance of the transaction in the one case are such that a rule requiring the outsider to ascertain, at his peril, the contemplated scope of the corporation's action is not unreasonable; the nature of the transaction in the second case is such that to apply the same rule is palpably unreasonable.

Those who contract with a corporation in respect to its business are entitled to consideration as well as those who contract with a corporation in respect to its securities.

In *Eastern Counties Ry. Co. v. Hawkes*,¹² Lord St. Leonards said that his disposition was

"to restrain the doctrine of *ultra vires* to clear cases of excess of power, with the knowledge of the other party, express, or implied from the nature of the corporation and of the contract entered into."¹³

It is submitted that the courts should not require persons contracting with corporations to ascertain at their peril the contemplated scope of corporate action, unless the nature of the corporation and the contract make such requirement reasonable. (The subsidiary facts being found, the ultimate question whether, on such facts, such a requirement is reasonable should be for the court to determine.)

In the case put at the opening of the article such a requirement, it is submitted, would not be reasonable. Is M, under such circumstances, to be sacrificed, not to the interests of the state, but to the interests of a shareholder, N, who may have come in since the contract was made, or to the interest of a creditor, P?

M and N are both innocent. By allowing the corporation to defend, the courts inflict the whole burden on M, and only a fraction of the benefit accrues to N (such fraction as his stock is of the whole capital stock), and the rest of the benefit accrues to those who are repudiating their own acts.

Unless the discharge of the obligation to M appreciably weakens

¹² 5 H. L. Cas. 331, 373 (1855).

¹³ See also *Sturdevant v. Bank*, 62 Neb. 472.

P's security, the burden to him is merely conjectural. It is probably the law that a creditor cannot restrain a corporation from embarking its funds upon a venture outside the contemplated scope of corporate action, unless his security is endangered.¹⁴ It is therefore extraordinary that the corporation should be allowed to escape its liability to M for the sake of protecting P.

It is accordingly submitted that, (1) if all the shareholders of X who were such at the time the contract with M was made authorized or ratified the transaction of the business in the course of which this contract was made, and (2) if M did not know and could not reasonably be charged with knowledge that the contract was outside the contemplated scope of X's action, then X should not be allowed to defend on the ground that the contract was *ultra vires*.

If any exception to this general rule ought to be made, it would be where the discharge of the obligation to M would take funds needed to pay or adequately to secure other creditors. It is submitted that there should be no exception. Suppose A, a natural person, borrowed from B, promised B to employ the funds only in a certain venture, but did employ them in another venture, and, in conducting the other venture, made a contract with M. Certainly A could not escape liability on his contract with M, for the sake of B, if M did not know, and could not reasonably be charged with knowledge, that A owed this duty to B.

It may be suggested that it does not prejudice M to lose his suit against the corporation, for he should be entitled to some remedy against the associates individually who consented to the prosecution of the *ultra vires* venture. The argument is as broad as it is long. If the future shareholders or the creditors are prejudiced through M's recovery, they should be entitled to some remedy against such associates.

If M knew or could reasonably be charged with knowledge that the contract was *ultra vires* he may, with propriety, be said to be in fault. He may be entitled to some remedy against the associates individually who consented to the prosecution of the *ultra vires* venture, and he may be entitled to quasi-contractual relief against the corporation, but he should not be entitled to relief against the corporation on the contract.

¹⁴ Mills v. Northern Ry., 5 Ch. App. 621.

If any exception to this general rule ought to be made, it would be where M affirmatively establishes that no new shareholders have come in, and that the discharge of the obligation to him would not take funds needed to pay or adequately to secure other creditors. It is submitted that there should be no exception. It is desirable that there should be some checks on unauthorized corporate action by collateral attack, if this does not produce injustice between the parties, and if it is in fact reasonable to charge M with knowledge that the contract was *ultra vires*, it is also reasonable to discourage his participating in such contracts by making a sweeping rule that he may never recover against the corporation on such contracts.

So far we have assumed that M was the plaintiff. Assume now that the corporation sues M for the breach of a contract between them, and M seeks to defend on the ground that the contract was *ultra vires* of the corporation.

If M could have enforced the contract against the corporation, there is no sufficient reason why the corporation should not enforce it against M.

If M could not have enforced the contract against the corporation, it is submitted that the corporation ought not to be allowed to enforce it against M.

The promise of the corporation, although unenforceable, is not void. When executed, it becomes the foundation of rights.¹⁵ It resembles not a promise rendered void by coverture but a promise rendered unenforceable by illegality. M is therefore not entitled to defend on the ground that there was no consideration for his promise.

But if M was at fault, the associates were more at fault. If any one ought to be charged with knowledge of the scope of corporate action, it is the associates themselves. The associates certainly could not sue as a corporation on the contract, except on the plea of bringing advantage to those who had bought stock since the contract was made, or to those who were its creditors. If this were permitted, the unauthorized contracts of a corporation would be like the contracts of an infant. No loss, and only gain, could result to the associates from entering into them. The whole burden

¹⁵ See 23 HARV. L. REV. 495.

of an inhibitory policy against such contracts would fall upon the outsiders. It is desirable that the associates, as well as the outsiders, should be loath to enter into such contracts.

The state of the authorities is indicated in a note.

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NOTE ON THE AUTHORITIES.

Authorities denying all relief on the contract.

There has been no adequate consideration by the courts of the question whether M, in all cases, is to be charged with knowledge that the contract in question was *ultra vires* of the corporation. There are decisions by the Supreme Court of the United States, written by Mr. Justice Gray, in which such a rule is laid down in sweeping terms, and M is denied all relief against the corporation on the contract. *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24; *McCormick v. Market Bank*, 165 U. S. 538. See the review of the decisions in this court in 23 HARV. L. REV. 498-504.

The court treats as immaterial the question whether all the shareholders had authorized or ratified the *ultra vires* venture.

The same result is reached by the English courts. *East Anglian Railways Co. v. Eastern Counties Railway Co.*, 11 C. B. 775; *Gage v. Newmarket Ry. Co.*, 21 L. J. N. S. (Q. B.) 398; *MacGregor v. Deal Ry. Co.*, 22 L. J. N. S. (Q. B.) 69; *South Yorkshire Ry. v. Great Northern Ry. Co.*, 9 Exch. 55; *Shrewsbury Ry. Co. v. North-Western Ry. Co.*, 6 H. L. Cas. 113; *Re Phoenix Life Assurance Society*, 2 J. & H. 441; *Ashbury Ry. Co. v. Riche*, L. R. 7 H. L. 653 (this remains the leading case).

There are authorities in many of the state courts which reach the same result, or, at least, give some sanction to the reasoning of Mr. Justice Gray. In many of these cases, however, the contract was made without the authority or acquiescence of all the shareholders, and the courts base their decisions partly on this fact.

Alabama: *Chewacla Lime Works v. Dismukes*, 87 Ala. 344; *Steiner v. Steiner Co.*, 120 Ala. 128, 141.

Connecticut: *Hood v. N. Y. & N. H. R. R. Co.*, 22 Conn. 502; *Byrne v. Schuyler Mfg. Co.*, 65 Conn. 336.

Georgia: *First National Bank of Tallapoosa v. Monroe*, 69 S. E. 1123. (*Cf. Macon Co. v. Georgia R. R. Co.*, 63 Ga. 103, 119.)

Illinois: *National Home Assn. v. Home Bank*, 181 Ill. 35; *Best Brewing Co. v. Klassen*, 185 Ill. 37. (The older cases of *Ward v. Johnson*, 95 Ill. 215, and *Heim's Brewing Co. v. Flannery*, 137 Ill. 309, are apparently no longer law.)

Maine: *Franklin Co. v. Lewiston Bank*, 68 Me. 43; *Brunswick Gas Light Co. v. United Gas Co.*, 85 Me. 532.

Maryland: *Western Maryland R. R. Co. v. Blue Ridge Co.*, 102 Md. 307. (*Cf. General Home v. Hammerbacker*, 64 Md. 595, 606; *United German Bank v. Katz*, 57 Md. 128.)

Massachusetts: *Davis v. Old Colony R. R. Co.*, 131 Mass. 258; *Dresser v. Traders' Bank*, 165 Mass. 120. (*Cf. Chester Glass Co. v. Dewey*, 16 Mass. 94, 102; *Slater Woollen Co. v. Lamb*, 143 Mass. 420; *N. Y. Bank Note Co. v. Kidder Press Mfg. Co.*, 192 Mass. 391, 404.)

Mississippi: Greenville Compress *v.* Planters' Press, 70 Miss. 669, 676. (*Cf.* Prairie Lodge *v.* Smith, 58 Miss. 301.)

New Hampshire: Downing *v.* Mount Washington Road Co., 40 N. H. 230; Norton *v.* Bank, 61 N. H. 589. (*Cf.* Abbott *v.* Bank, 68 N. H. 290.)

Ohio: Bank of Chillicothe *v.* Swayne, 8 Ohio 257; Simpson *v.* Building Assn., 38 Oh. St. 349.

Tennessee: Marble Co. *v.* Harvey, 92 Tenn. 116. (*Cf.* Tennessee Ice Co. *v.* Raine, 107 Tenn. 151.)

Vermont: Metropolitan Stock Exchange *v.* National Bank, 76 Vt. 303.

Authorities giving relief on the contract under some circumstances.

In New York, it cannot be said that the courts have expressly repudiated the rule that M, in all cases, is to be charged with knowledge that the contract in question was *ultra vires* of the corporation. But the decisions can scarcely be reconciled with the existence of such a rule. ("To hold that one dealing with a corporation must know the limit of its power to contract in all cases, upon the ground that it will be presumed to know the law, would seem to be fatal to all cases of estoppel when *ultra vires* is set up as a defense." *Per* Hooker, J., in *Geraghty v. Washtenaw Co.*, 145 Mich. 635, 640.) The law seems to be that if the corporation has not received from M anything of value by reason of the performance, in whole or in part, of his side of the contract, M will be given no relief against the corporation. *Jemison v. Citizens' Bank*, 122 N. Y. 135; *Appleton v. Citizens' Bank*, 190 N. Y. 417; *Gause v. Commonwealth Trust Co.*, 106 N. Y. Supp. 288. (*Cf.* *Martin v. Niagara Falls Co.*, 122 N. Y. 165.) But if the corporation has received from M something of value by reason of the performance, in whole or in part, of his side of the contract, then M may have relief against the corporation on the contract itself to a corresponding extent. *Comstock, C. J., in Bissell v. Michigan Southern Companies*, 22 N. Y. 258; *Parish v. Wheeler*, 22 N. Y. 494; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 70; *Palmer v. Cemetery*, 122 N. Y. 429, 435; *Linkhauf v. Lombard*, 137 N. Y. 417; *Hannon v. Siegel-Cooper Co.*, 167 N. Y. 244; *Vought v. Eastern Bldg. Ass'n*, 172 N. Y. 508; *Milborne v. Royal Benefit Soc.*, 14 N. Y. App. Div. 406; *Usher v. N. Y. Central R. R. Co.*, 76 N. Y. App. Div. 422; *Curtis v. Natalie Coal Co.*, 89 N. Y. App. Div. 61.

The corporation may have similar relief against M. *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Woodruff v. Erie Ry. Co.*, 93 N. Y. 609; *Rider Co. v. Roach*, 97 N. Y. 378; *Buffalo v. Balcom*, 134 N. Y. 532; *Bath Gas Light Co. v. Claffy*, 151 N. Y. 24; *Washington Life Ins. Co. v. Clason*, 162 N. Y. 305.

There are authorities in many of the state courts which give the same, or similar, results.

Arkansas: Minneapolis Ins. Co. *v.* Norman, 74 Ark. 190; *Western Development Co. v. Caplinger*, 86 Ark. 287.

California: Bay City Ass'n *v.* Broad, 136 Cal. 525.

Colorado: Denver Fire Ins. Co. *v.* McClelland, 9 Colo. 11.

Indiana: State Board *v.* Citizens Street Ry. Co., 47 Ind. 407; *Poock v. Lafayette Ass'n*, 71 Ind. 357; *Pancoast v. Travelers Ins. Co.*, 79 Ind. 172, 178; *Louisville Ry. Co. v. Flanagan*, 113 Ind. 488, 495; *Wright v. Hughes*, 119 Ind. 324; *Muncie Gas Co. v. Muncie*, 160 Ind. 97, 104. (*Cf.* *Franklin Nat'l Bank v. Whitehead*, 149 Ind. 560.)

Iowa: See the reasoning of the court in *Re Mutual Ins. Co.*, 107 Ia. 143.

Kansas: *Harris v. Gas Co.*, 76 Kan. 750; *Electric Co. v. Blue Rapids Township*, 77 Kan. 580.

Louisiana: Canal Co. v. St. Charles Co., 44 La. Ann. 1069, 1075.

Massachusetts: Chester Glass Co. v. Dewey, 16 Mass. 94, 102; Slater Woollen Co. v. Lamb, 143 Mass. 420; N. Y. Bank Note Co. v. Kidder Press Mfg. Co., 192 Mass. 391, 404. (*Cf.* Davis v. Old Colony R. R. Co., 131 Mass. 258; Dresser v. Traders' Bank, 165 Mass. 120.)

Michigan: Hall Mfg. Co. v. American Supply Co., 48 Mich. 331; Carson City Bank v. Elevator Co., 90 Mich. 550; Dewey v. Ry. Co., 91 Mich. 351; Rehberg v. Tontine Surety Co., 131 Mich. 135; Geraghty v. Washtenaw Co., 145 Mich. 635.

Minnesota: Seymour v. Chicago Society, 54 Minn. 147; Bell v. Mendenhall, 78 Minn. 57.

New Jersey: Camden R. R. Co. v. Mays Landing Co., 48 N. J. L. 530; Chapman v. Iron Clad Co., 62 N. J. L. 497; Whitehead v. American Lamp Co., 70 N. J. Eq. 581.

North Carolina: Trustees v. Realty Co., 134 N. C. 41, 49.

North Dakota: Clarke v. Olson, 9 N. Dak. 364.

Pennsylvania: Oil Creek Co. v. Penn. Transportation Co., 83 Pa. 160; Wright v. Pipe Line Co., 101 Pa. 204; Boyd v. American Carbon Block Co., 182 Pa. 206; Pittsburg R. R. Co. v. Altoona R. R. Co., 196 Pa. 452; Presbyterian Board v. Gilbee, 212 Pa. 310, 314.

Texas: Bond v. Terrell Co., 82 Tex. 309.

Utah: Bear River Co. v. Hanley, 15 Utah 506.

Wisconsin: Farwell Co. v. Wolf, 96 Wis. 10; McElroy v. Minnesota Co., 96 Wis. 317; Ledebuhr v. Wisconsin Trust Co., 112 Wis. 657, 662.

Where the plaintiff performs after the defendant has repudiated the contract.

If the contract is wholly executory on both sides, the authorities are nearly unanimous that no action for breach of the contract may be maintained. But see the reasoning of the court in *Harris v. Gas Co.*, 76 Kan. 750.

In *First Presbyterian Church v. State Bank*, 57 N. J. L. 27, 31, a corporation contracted to pay A so much a year, so long as he refrained from erecting a certain building. After several payments had been made, the corporation notified A that it would no longer recognize the contract. A continued to refrain from erecting the building, and was allowed to recover on the contract. See also *Pannebaker v. Tuscarora R. R. Co.*, 219 Pa. 60; *Ledebuhr v. Wisconsin Trust Co.*, 112 Wis. 657, 662.

Where the corporation is the plaintiff.

By the distinct weight of authority, the rules regulating recovery on an *ultra vires* contract are the same whether M, or the corporation, is plaintiff. See *Copper Miners v. Fox*, 15 Jur. 703; *Nassau Bank v. Jones*, 95 N. Y. 115; *Bank of Chillicothe v. Swayne*, 8 Ohio 257; *Marble Co. v. Harvey*, 92 Tenn. 116. (*Cf.* *Davis v. Old Colony R. R. Co.*, 131 Mass. 258, 272.)

In *National Bank v. Matthews*, 98 U. S. 621, a bank had loaned money on the security of real estate, and was allowed to enforce the security. In *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24, a corporation made a lease, and was not allowed to recover the rent reserved. In both cases the corporation which had done the *ultra vires* act was the plaintiff. Therefore these two cases cannot be distinguished on the ground that the court has one rule when the corporation is plaintiff, and another when M is the plaintiff.

Mortgages and leases.

May the two cases just cited be distinguished on the ground that a lease is an executory transaction, and a mortgage is an executed transaction?

It is submitted that a contract is never executed until the parties have purported to do all that they promised to do. The question whether the plaintiff should be given specific performance of a promise by the defendant, or should be given damages because of non-performance cannot arise if the transaction is executed.

If all the consideration for a lease has been paid, the transaction is executed, but not otherwise. *Harris v. Gas Co.*, 76 Kan. 750; *Memphis Co. v. Grayson*, 88 Ala. 572, 577. But see *Pittsburgh R. R. Co. v. Altoona R. R. Co.*, 196 Pa. 452, 467; *Camden R. R. Co. v. Mays Landing Co.*, 48 N. J. L. 530.

A mortgage is given as security for the performance of a promise. In substance, the transaction is therefore executory. See *Bank of Gadsden v. Winchester*, 119 Ala. 168, 171.

The real explanation of *National Bank v. Matthews*, taken in connection with *Central Transportation Co. v. Pullman's Car Co.* is that at the time the *Matthews* case was decided the court did not entertain the views on *ultra vires* contracts which were later expressed by Mr. Justice Gray. The reasoning of the two cases is inconsistent, and, in intellectual honesty, ought to be recognized as inconsistent.

Devises and bequests.

A word as to devises and bequests to charitable corporations of property which (owing to its amount) they are not authorized to take. Here no question of contract — of promises — is involved. There is no dispute *inter partes*, — the testator wished to give, and the corporation wishes to receive. Moreover, the rights of the investing public are in no wise involved. The only objection is that, as against the state, the taking is unauthorized. It would seem therefore that, if the state does not wish to object (and, *a fortiori*, if the state has expressly waived its right to object), there is no occasion to allow the heirs or next of kin to array themselves in opposition to the will. The danger to the public possibly arising from large aggregations of property in the hands of corporations is sufficiently guarded against by the power of direct attack by the state, — this does not need to be supplemented by collateral attack.

This view makes it immaterial to consider whether devises and bequests are executed or executory transactions. If the question were material, a devise would seem to be quite as much an executed transaction upon the death of the testator as a conveyance *inter vivos* is executed upon the delivery of the deed. In the one case the court must decide that the paper-writing is a will, but in the other case it must decide that the paper-writing is a deed. The nature of a bequest is not so clear. The legatee will usually need the aid of the court to obtain the property (and, at least, the executor will need the sanction of the court for having paid the money), and a court would probably be disinclined to regard the transaction as executed upon the death of the testator.

There seems to be no decision in which one rule has been laid down as to devises, and another as to bequests. (See, however, the opinion of Battle, J., in *Davidson College v. Chambers*, 3 Jones Eq. (N. C.) 253, 260.)

Collateral attack upon such devises and bequests was denied in *Jones v. Habershaw*, 107 U. S. 174; *Brigham v. Brigham Hospital*, 134 Fed. 513, 527; *White v. Howard*, 38 Conn. 342; *Eliot's Appeal*, 74 Conn. 586; *Hamsher v. Hamsher*, 132 Ill. 273; *Hayward v. Davidson*, 41 Ind. 212; *Farrington v. Putnam*, 90 Me. 405;

Hanson v. Little Sisters of the Poor, 79 Md. 434; *In re Stickney's Will*, 85 Md. 79, 104; *Hubbard v. Worcester Art Museum*, 194 Mass. 280; *Chambers v. St. Louis*, 29 Mo. 543.

Collateral attack was permitted in *Cromie v. Louisville Orphans' Home*, 3 Bush (Ky.) 365, 383; *Matter of McGraw*, 111 N. Y. 66; *Davidson College v. Chambers*, 3 Jones Eq. (N. C.) 253; *Wood v. Hammond*, 16 R. I. 98, 115; *House of Mercy v. Davidson*, 90 Tex. 529.